TAM KUT HING

v.

KEY QUOTES SERVICES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2(S5)-23-40-1996]
23 FEBRUARY 2000

CIVIL PROCEDURE: *Striking out - Ground - Inordinate delay - Whether defendants prejudiced by delay*

The plaintiff claimed against the defendants for libel. This was the defendants' application to strike out the said suit for want of prosecution. The chronology of events, *inter alia*, showed that the pleadings were closed at 10 July 1996; the summons for directions taken out on 25 February 1997 and the order of the court given on 16 April 1997. The defendants' complaint was that for nearly two and a half years the plaintiff did nothing before filing the notice of intention to proceed on 4 October 1999 which was filed after the plaintiff's application to strike out for want of prosecution which was filed on 30 September 1999. The defendants averred that because of that inordinate delay they would not be able to get two important witnesses for the trial who had since left the employment of the 1st defendant.

Held:

[1] The defendants had neither stated the nature of their witnesses' evidence and how material it would be to their case nor did the defendants state when these witnesses left the employment of the 1st defendant. These two factors are important for they would guide the court in making a decision to strike out on the basis that the defendants' two main witnesses would not be available. Further, no evidence was led to show the effort made to trace the whereabouts of the said witnesses.

[1a] There was clearly no satisfactory evidence before the court to show that such a delay gave rise to a substantial risk that it was not possible to have a fair trial or that it would be likely to cause or would cause serious prejudice to the defendants.

[2] Even if the application to strike out was allowed, the plaintiff was still within time to refile. Whilst it was a fact that striking off would clear one case from the backlog of cases, the law allowed the plaintiff to refile the same writ within the next ten months. Therefore, considering the matter in its totality, it would be prudent to disallow the instant application and to set down the case for trial and to case manage it.

[3] In an application to strike off for want of prosecution it would be difficult to rely on precedents. Each case must be dealt with on its own merits.

[4] Whilst this court did agree that there had been a long delay in the prosecution of this suit, the defendants, however, had not satisfactorily explained whether such delay would prejudice them in obtaining the two witnesses.

[Application dismissed; costs in the cause.]

Case(s) referred to:
Birkett v. James [1977] 3 WLR 38 ***(refd)***
Commercial Union Assurance (M) Sdn Bhd v. Asean Security Paper Mills Sdn Bhd [1999] 2 CLJ 719 ***(refd)***
TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin [1997] 3 MLJ 800 ***(refd)***
Trustee of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***
United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd [1994] 3 CLJ 144 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25 rr. 1(1), (4)

For the plaintiff/respondent - Jayaprathap; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the defendants/applicants - Tunku Alina Alias; M/s Wong Lu Peen & Tunku Alina

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Application

This is the defendants' application to strike off the suit for want of prosecution pursuant to the inherent jurisdiction of the court. Alternatively, the defendants seek to strike off because of the failure of the plaintiff to apply for and seek an order for summons for directions pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980 within the time stipulated therein. There was also the prayer for the taxed costs to be paid by the plaintiff.

Facts

The plaintiff's claim against the defendants is for libel. For the purposes of this application I need not descend into details of the suit. The defendants submitted a chronology of events leading to their application and the plaintiff

did not object to same. I therefore accept the said chronology of events as correct for the purposes of this application:

Chronology of Events

26.5.95 Writ of summons filed. Case first registered as D1-22-266-95.

4.8.95 Judgment in default was entered against 1st defendant.

21.10.95 1st and 2nd defendants entered appearance.

22.11.95 2nd defendant filed defence.

1.12.95 1st defendant applied to set aside judgment in default.

21.12.95 Plaintiff filed reply to 2nd defendant's defence.

17.1.96 Senior Assistant Registrar allowed 1st defendant's application to set aside judgment in default. Plaintiff appealed to Judge in chambers.

21.5.96 Plaintiff's appeal dismissed by Judge.

10.6.96 1st defendant filed defence.

10.7.96 Pleadings deemed to be closed.

15.7.96 Court transferred suit to Court Civil 5 and renumbered case as S5-23-40-1996.

25.2.97 Plaintiff filed summons for directions. Plaintiff to deliver list of documents within 60 days, defendants to deliver list of documents within 60 days, inspection of documents within 60 days and plaintiff to set the matter down for trial within 30 days.

16.4.97 Order on summons for directions given by Court.

10.9.99 Defendants filed notice of change of solicitors and served on plaintiff's solicitors.

27.9.99 Plaintiff's solicitors' letter to Court filing draft order on summons for directions.

30.9.99 Defendants filed summons in chambers to dismiss plaintiff's writ for want of prosecution.

3.10.99 Plaintiff affirmed affidavit verifying list of documents.

4.10.99 Date of notice of intention to proceed.

9.10.99 Plaintiff's solicitors conducted Court file search.

12.10.99 Plaintiff's solicitors conducted Court file search and thereafter filed order on summons for directions (see Enclosure 45 paragraph 13).

Findings Of The Court

In her submission Tunku Alina for the defendants conceded that she had no complaints regarding the plaintiff's conduct up to 10 June 1996 as stated in the chronology of events. The pleadings were deemed closed as at 10 July 1996. The summons for directions was taken out on 25 February 1997 and the order of the court was given on 16 April 1997. The defendants' complaint is that for nearly two and a half years the plaintiff did nothing before filing the notice of intention to proceed on 4 October 1999 which was filed after the plaintiff's application to strike out for want of prosecution which was filed on 30 September 1999. It is not in dispute that the solicitors for the plaintiff were the same solicitors throughout. The plaintiff averred in his affidavit in reply that before the defendants had filed their application to strike off on 30 September 1999, he had filed the draft order on 27 September 1999. Counsel for the defendants has pointed out that she had made a search of the court file and had ascertained that whilst the letter enclosing the draft and addressed to the senior assistant registrar was dated 27 September 1999 it was hand delivered to the court only on 29 October 1999 as shown by the receipt chop endorsed on the said letter. Clearly therefore the draft order was in itself filed one month after the defendants had filed the application to strike out. The defendants now aver that because of this inordinate delay they will not be able to get two important witnesses for the trial, who have since left the employment of the 1st defendant. But what is important is that the defendants have neither stated the nature of their witnesses' evidence and how material it would be to their case nor did the defendants state when these witnesses left the employment of the 1st defendant. These two factors are important for they will guide the court in making a decision to strike out on the basis that the defendants' two main witnesses would not be available. In fact in *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd* [1994] 3 CLJ 144; [1994] 3 MLJ 73 the then Supreme Court held that because the affidavit evidence filed failed to disclose which key witnesses of the respondents had since died it was not possible for the court to decide that there would be a substantial risk of a fair trial being held. There is also evidence that the defendants themselves have changed solicitors three times during the course of the trial. So far from all the numerous affidavits I gather that the defendants' complaint is that because of the delay they would be unable to fully defend themselves because they would not be able to get two key witnesses. As I have said whilst this is a very strong ground that could lead a judge to exercise his discretion in favour of the applicant to strike out the proceedings, the defendants have failed to clearly spell out the prejudice. It is vital to state the type of evidence that would have been adduced by the two witnesses. Further, no evidence has been led to show the effort made to trace the whereabouts of the witnesses. It is common knowledge that upon payment of a prescribed fee, the National Registration Department would be

able to furnish any applicant, the current address of any person. No evidence was led whether this was indeed done. There is clearly therefore no satisfactory evidence before me that such a delay as has been shown gives rise to a substantial risk that it is not possible to have a fair trial or that it would be likely to cause or would cause serious prejudice to the defendants. Whilst the plaintiff contends that there were negotiations for settlement, the defendants have denied the same. I shall therefore not consider this an issue in deciding whether to strike out or not.

Further the alleged libel was deemed to have been committed on or about 12 December 1994 by way of a letter, from the defendants. Even if I agree with the request of the defendants and allow the application, the plaintiff is still within time to refile. Whilst it is a fact that striking off would clear one case from the backlog, within the next ten months the law allows the plaintiff to refile the same writ, to add one more case to the backlog, and the court is back to square one. Therefore considering the matter in its totality, I am of the view that it would be prudent to disallow this application and to set the case down for trial and to case manage it. After all, within the next three case managements this case will be given a trial date. It is important to remember that in an application to strike off for want of prosecution it would be difficult to rely on precedents. Each case must be dealt with on its own merits. In fact in *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin* [1997] 3 MLJ 800, the Court of Appeal very correctly held that the trial judge has the sole discretion on whether to grant or refuse an application to strike out an action for want of prosecution and that the appellate court would review the exercise of such a direction where it was clearly exercised wrongly. Whilst I agree there has been a long delay in the prosecution of this suit, the defendants have not satisfactorily explained whether such delay would prejudice them in obtaining the two witnesses. With this view, I must now consider the recent decision of the Court of Appeal in *Trustee of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin* [1998] 4 CLJ 368; [1998] 4 MLJ 373. In that case the respondent took out a writ against both appellants for damages suffered by him when the appellants and their agents demolished his premises, his store and also his fruit trees. There was a delay of one year and nine months from the date the pleadings were deemed to be closed until the respondent filed his summons for directions. The court subsequently issued a notice to show cause why the respondent's claim should not be struck out for want of prosecution. The appellants then filed this application to strike out the respondent's writ and statement of claim for want of prosecution and served it on the respondent. The appellants' complaint was that the respondent's delay in filing the summons for directions by one year and nine months was inordinate and inexcusable. The trial judge dismissed the appellants' application to strike out the respondent's writ and statement of claim. The appellants appealed. In allowing the appeal the court held that

the trial judge had erred when he said that in order for the appellants to succeed there must be grossly inordinate delay. The law states that there must be inordinate and inexcusable delay and that the defendants had been prejudiced by it. The Court of Appeal held that the respondent had filed his writ and statement of claim five years and 11 months after the cause of action had arisen, which was merely one month before the limitation period set in. Though the action was not time-barred, a long delay in issuing the writ had caused the appellants prejudice and they only had to show something more than minimal additional prejudice to justify the action being struck out. Further, an action on trespass should be acted on promptly in order to avoid more damage being done. The delay in instituting the present action by the respondent after more than five years had caused the appellants considerable injustice. After the filing of the writ, the respondent took out the summons for directions, which resulted in another delay of about one year and nine months after the pleadings were deemed to be closed. There was no evidence to show that the respondent did anything to prompt the court to give a return date for that summons until the court issued a notice to show cause to the respondent. In giving the judgment of the court Mokhtar Sidin JCA held that in addition to the well established two grounds for striking off as decided in *Birkett v. James* [1977] 3 WLR 38, namely, (1) that the plaintiff's default has been intentional and contumelious, or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it, there would now emerge a new third limb that is "where there is no inordinate and inexcusable delay which involved complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground." He also emphasised that in applying this limb, there is then no necessity to show prejudice in such cases. It must be borne in mind that whilst considering this third limb the Court of Appeal indicated that this third limb could also be an off shoot of the second limb as decided in *Birkett*. With this linkage, it is relevant to note that in the *Trustees of Leong San* case the court considered that there was inordinate and inexcusable delay on the part of the respondent/ plaintiff in filing the writ just one month before the six-year limitation period expired and that there was a further delay in the filing of the summons for directions, that is, one year and nine months after the pleadings were deemed to have been closed when pursuant to O. 25 r. 1(1) the plaintiff must take out the summons for directions within one month after the pleadings in the action are deemed to be closed. It is therefore obvious that there was a lapse of five years 11 months and one year nine months making a total lapse of seven years eight months unaccounted for by the plaintiff in that case. On the contrary in the case before me whilst the alleged libel was published sometime in or about 12 December 1994 the writ was initially issued against

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the defendants on 26 May 1995 in the commercial division as D1-22-266-95. From a perusal of the court file I note that on 28 May 1996 when a document was filed, this case was transferred from the commercial division to Civil Court No. 5 under Civil Suit No. S5-22-340-96. Subsequently, by a letter dated 29 October 1999 and pursuant to a direction from the chief judge, Malaya, this case was transferred from Civil Court No. 5 to this court which is presently the court designated to hear all defamation suits. In fact even the defendants have admitted that their complaint is only in respect of matters occurring after 10 June 1996 when the 1st defendant filed its defence. The delay is in respect of the period between 16 April 1997 when the order for summons for directions was given and the subsequent actions that occurred since September 1999. It would seem that one other factor that motivated the Court of Appeal to come to such a decision as it did in the *Trustees of Leong San*, was the consideration given relating to case flow management so that cases could be concluded within time. I had introduced case management in my court for the very purpose of speeding up trials and as I have said earlier within the next 3 months this case would be given trial dates. I am further fortified in refusing this application after reading a very recent decision of the Court of Appeal delivered in *Commercial Union Assurance (M) Sdn Bhd v. Asean Security Paper Mills Sdn Bhd* [1999] 2 CLJ 719; [1999] 2 AMR 1578 which was delivered long after the decision in the *Trustees of Leong San* was reported. This was also a case dealing with an application to strike out the suit on the ground that there had been inordinate and inexcusable delay on the part of the plaintiff/respondent in the prosecution of the suit. The Court of Appeal unfortunately was not referred to its own decision in the *Trustees of Leong San*. The Court of Appeal in the commercial union case did not at all revert to the 3rd limb for consideration as it did in the *Trustees of Leong San*. Instead it held that if the appellant/defendant was not prejudiced by the delay, even if it had been prolonged and inexcusable, the suit should not be dismissed.

For all the reasons I have already considered earlier I do not think that I ought to exercise my discretion in the defendants' favour to strike out the suit for want of prosecution either pursuant to the inherent jurisdiction of the court or for failing to comply with the order for summons for directions.

This is a proper case to order costs in the cause.